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No. 85-1403

Supreme Court, U.S.
FILED
MAY 30 1986
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In the Supreme Court of the United States

OCTOBER TERM, 1985

KANSAS GAS & ELECTRIC CO., PETITIONER

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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UESTION PRESENTED

Whether Section 210(a) of the Energy Reorganization Act, 42 U.S.C. 5851(a), protects quality assurance inspectors from discharge or other discrimination for filing unfavorable nuclear safety and quality assurance reports with their employers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 780 F.2d 1505. The final decision and order of the Secretary of Labor (Pet. App. A21-A31) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1985. The petition for a writ of certiorari was filed on February 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Kansas Gas & Electric Co. contends that the "whistle blower" protection provisions in Section 210(a) of the Energy Reorganization Act (ERA), 42 U.S.C. 5851(a), do not include as a protected activity an employee's filing of an internal quality control report with his employer. The Secretary of Labor (Pet. App. A21-A31) rejected this contention, and the United States District Court for the District of Kansas (*id.* at A32-A34) ordered petitioner to comply with the Secretary's order of reinstatement and other relief, concluding that a challenge to the order could lie only with the court of appeals. The decisions of the Secretary and the district court were consolidated on appeal to the Tenth Circuit, which affirmed both (*id.* at A1-A20).

1. Petitioner is the owner of the Wolf Creek nuclear power plant in Burlington, Kansas, and a licensee of the Nuclear Regulatory Commission (NRC) (Pet. App. A3). As a licensee, it is required to comply with statutory and regulatory safety requirements concerning the construction and operation of nuclear facilities and also is subject to Section 210(a) of the ERA. That section forbids discharge of, or other forms of discrimination against, any employee who, among other things, has "commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding" under the nuclear energy statutes, or has "assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding [sic] or in any other action to carry out the purposes" of the statutes.

To carry out its responsibilities to ensure the safety of nuclear power plants, and to supplement its

own surveillance, the NRC requires its licensees to maintain an onsite quality assurance program. This program, established pursuant to the NRC's rulemaking authority (see 42 U.S.C. 2201(p)),[1] is implemented by assigning employees of the licensees or their contractors to ensure compliance with NRC requirements by verifying—through checking, auditing, and inspections—that activities affecting the safety-related functions of nuclear power plants have been correctly performed (see 10 C.F.R. 50, App. B, § I). The NRC requires that "[t]he persons and organizations performing quality assurance functions shall have sufficient authority and organizational freedom to identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions" (*ibid.*). Licensees must correct quality assurance problems and keep records of quality assurance activities (*id.* §§ XVI, XVIII), which are open to NRC inspection (10 C.F.R. 50.70, 50.71). A failure to correct reported violations may result in license revocation, prosecution, or fine (see *id.* §§ 50.100, 50.110).

2. a. In April 1983, petitioner hired co-respondent James Wells to be a quality assurance inspector in an inspection group (Pet. App. A4, A23). The group was established to comply with the NRC's regulations and in response to a previous NRC investigation and fine (*ibid.*). Wells' job was to inspect electrical equipment and report safety problems he found (*id.* at A23). In the course of doing his job, Wells discovered what he believed to be various safety problems, and on June 20, 1983, reported them to petitioner's

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[1] Originally, rulemaking and licensing powers were vested in the Atomic Energy Commission; the ERA transferred these functions to the NRC (42 U.S.C. 5841(f)).

quality assurance manager (*id.* at A4, A23). That same afternoon, Wells was called to a meeting with the manager and Wells' immediate supervisor and told that, for various reasons, he was fired (*id.* at A4, A23-A24). After Wells protested that the firing was because he had voiced safety concerns, the manager and supervisor conferred privately and then told Wells the firing was rescinded and he was getting a second chance (*ibid.*).

Wells made further reports of safety deficiencies and, on August 2, 1983, was informed that he had until August 5, 1983, to verify certain education and work experience qualifications or be fired (Pet. App. A4-A5, A24-A25). Wells told his supervisors he needed more time to obtain the verifications, but on August 4, 1983—the day before his deadline—he was nevertheless fired (*id.* at A5, A25-A26). Two weeks later, when Wells said he had obtained the verifications, petitioner nonetheless refused to rehire him (*id.* at A5, A26). Wells filed a complaint with the Department of Labor on August 29, 1983, alleging that petitioner had retaliated against him because of his safety reports, in violation of Section 210(a) (Pet. App. A5, A21-A22).

b. A hearing was held before an administrative law judge. The Secretary of Labor adopted the ALJ's recommended decision and most of his factual findings, and concluded that petitioner had discharged Wells because of his safety reports. Pet. App. A26. The Secretary, relying on his previous decision in *Mackowiak* v. *University Nuclear Systems, Inc.*, No. 82-ERA-8 (DOL Apr. 29, 1983) (C.A. App. A6-A18), aff'd on this point, remanded on other grounds, 735 F.2d 1159 (9th Cir. 1984), also held that Section 210(a) of the ERA protected Wells' reporting of

safety concerns to his employer (Pet. App. A26). Thus, the Secretary ordered petitioner to reinstate Wells, with back pay, to his quality assurance position (*id.* at A31).

c. The court of appeals (Pet. App. A1-A20) affirmed the Secretary's decision, holding that Section 210(a) protects quality control inspectors from retaliation based on internal safety and quality control complaints (Pet. App. A9-A17).[2]

The court found the operative statutory language ambiguous (Pet. App. A11-A12) and thus undertook a careful analysis of the legislative history (*id.* at A12-A14). It concluded that the legislative history demonstrates that Congress intended to protect internal safety complaints. The court stressed that Congress expressly patterned Section 210(a) on employee protection provisions in the National Labor Relations Act and the Federal Mine Safety Act of 1969, and that the cases which had construed these acts "stand for the general proposition that internal actions taken by an employee" are statutorily protected (Pet. App. A12).

The court of appeals also found support for its construction of Section 210(a) in the statute's broad, remedial purpose of protecting workers from retaliation based on their safety and quality concerns, and in the NRC's regulations, which do not require a formal proceeding to invoke the protection of the ERA (Pet. App. A14-A16). The court thus rejected

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[2] The court of appeals also upheld the Secretary's findings that petitioner fired Wells for his safety reports instead of for legitimate business reasons (Pet. App. A17), and that petitioner had waived any right it may have had to contest the amount of back pay it owed Wells (*id.* at A17-A20). Petitioner has not requested review of these findings.

a "narrow, hypertechnical" reading of Section 210(a) because such a reading "will do little to effect the statute's aim of protection" (Pet. App. A16).[3]

ARGUMENT

The petition contends that this Court should grant review of this case because the court of appeals' decision was wrong and because it conflicts with *Brown & Root, Inc.* v. *Donovan*, 747 F.2d 1029 (5th Cir. 1984). In fact, however, the legislative history and purpose of the ERA make it abundantly clear that the decision of the court of appeals was correct. Indeed, the legislative history is so convincing that we are confident that when it is brought to the Fifth Circuit's attention—as it was not before—*Brown & Root* will be set aside. In the meantime, unsurprisingly, *Brown & Root* stands alone,[4] and, in light of the lim-

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[3] The court of appeals noted that its conclusion was supported by *Mackowiak* v. *University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Consolidated Edison Co.* v. *Donovan*, 673 F.2d 61 (2d Cir. 1982); and *Wheeler* v. *Caterpillar Tractor Co.*, 108 Ill.2d 502, 485 N.E.2d 372 (1985), cert. denied, No. 85-1457 (Apr. 21, 1986). The court "recognize[d] that a different result was reached in *Brown & Root* v. *Donovan*, 747 F.2d 1029 (5th Cir. 1984)," but concluded (Pet. App. A16):

> In our view, the construction of the ERA there employed is incorrect because it takes no notice of the agency regulations, tries to liken the term "action" [in the statute] as synon[y]mous with "proceeding," contends that such employment [decisions] are outside the competence of the Secretary of Labor because matters concerning nuclear safety are exclusively involved, and discovers nothing in the legislative history to support a broad construction of section 5851.

[4] In addition to the court of appeals' decision here, *Mackowiak* v. *University Nuclear Systems, Inc., supra*, held explicitly

ited number of employee complaints arising in the Fifth Circuit, it is acceptable to wait until *Brown & Root* can be reconsidered there. Therefore, review of the court of appeals' decision in this case is not warranted.

1. The court of appeals correctly concluded that Section 210(a) of the ERA protects employees making safety and quality assurance reports to their employers, as their jobs and the NRC require. The statutory language suggests that Congress was striving to make the protection of Section 210(a) very broad. Still, as the court of appeals recognized (Pet. App. A11), Congress's terminology—*i.e.*, the scope of "proceeding" and "action"—remains ambiguous. Nonetheless, the Department of Labor's construction of Section 210(a) is amply supported by the legislative history; the fact that quality assurance inspectors' internal reports have a central role in the NRC's safety enforcement; and the need to construe employee protection provisions so as to carry out Congress's protective purposes, as enunciated in *NLRB* v. *Scrivener*, 405 U.S. 117 (1972). Compare *Blum* v. *Stenson*, 465 U.S. 886, 896 (1984). Because the Department of Labor's (and NRC's) consistent construction of the statute is entirely reasonable, it was properly deferred to by the court of appeals. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

The Senate report accompanying the bill that amended the ERA to include Section 210(a) states that this section is "substantially identical" to provi-

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that internal complaints are protected activity under Section 210(a); *Consolidated Edison Co.* v. *Donovan, supra,* did so implicitly. In *Wheeler* v. *Caterpillar Tractor Co., supra,* the court also relied in part on Section 210(a) in finding that, under state law, a discharge of an employee for internal safety complaints violated clearly mandated public policy.

sions in the Clean Air Act and the Federal Water Pollution Control Act,[5] and that those acts were "patterned after the National Labor [Relations] Act and a similar provision in Public Law 91-173 [the Federal Mine Safety Act of 1969]." S. Rep. 848, 95th Cong., 2d Sess. 29 (1978).

This latter reference to a "similar provision" in the 1969 Federal Mine Safety Act (FMSA) is particularly illuminating. Prior to the enactment of Section 210(a), the relevant provision of the FMSA, which was in fact somewhat more narrowly written than Section 210(a),[6] had been construed to cover a miner's presentation of safety complaints to his employer. *Phillips* v. *Interior Board of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975); *Munsey* v. *Morton*, 507 F.2d 1202 (D.C. Cir. 1974) (following *Phillips*). The court in *Phillips*, moreover, expressly rejected an argument identical to petitioner's here, that the "bare words of the statute with their most limited interpretation" mean that "before a * * * safety com-

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[5] The coverage of the employee protection provisions of the Clean Air Act, 42 U.S.C. 7622, and the Federal Water Pollution Control Act, 33 U.S.C. 1367, have not yet been construed by any court of appeals.

[6] Section 110(b)(1) of the 1969 FMSA (codified at 30 U.S.C. (1970 ed.) 820(b)(1)) provided:

> No person shall discharge or in any other way discriminate against * * * any miner * * * by reason of the fact that such miner * * * (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

plaint is accorded the protection of the [statute] the [employee] must have instituted a formal proceeding with the [responsible governmental agency]" (500 F.2d at 779). Its conclusion that, instead, internal safety complaints are protected was based on the overall remedial purpose (also present here) of the 1969 FMSA, and the "practicalities of the situation" and the actual procedures in effect at the mine (*ibid.*). The procedures to which the *Phillips* court referred were established through collective bargaining, and required the miner, as an "essential preliminary stage" to commencing official governmental proceedings, to attempt corrective action by reporting safety problems first to company officials (*id.* at 779). The procedures were a practical recognition that the statute would be completely ineffective in achieving safety unless implemented by some procedure "to bridge the gap" between the employees who work in the mine and governmental authorities (*id.* at 781). These "practicalities" are equally present here.

Moreover, under the ERA, internal reporting of safety concerns is even more logically protected because a governmental agency, by regulation—rather than private parties, by contract—has established the internal reporting procedure. As the Ninth Circuit observed in *Mackowiak* v. *University Nuclear Systems, Inc.*, 735 F.2d at 1163, "In a real sense, every action by quality control inspectors occurs 'in an NRC proceeding,' because of [those employees'] duty to enforce NRC regulations." The quality assurance program here serves as the "eyes and ears of the NRC because the inspectors are always on site and take over much of the inspection burden from federal personnel" (Pet. App. A4 (citation omitted)).

Additionally, "[t]he observations and judgments of quality assurance personnel on potential construction deficiencies are documented and that documentation is preserved and facilitates NRC audits" (*ibid.*). Similarly, internal reporting of safety concerns by inspectors is even more logically protected than reports by miners because the former's central job responsibility is precisely to make such reports, on the one hand, and they have less personal safety incentive than miners to make safety reports, on the other.

At the time of the drafting of the Committee Report stating that Section 210(a) of the ERA was patterned after the 1969 FMSA, Congress had explicitly approved and adopted the *Phillips* interpretation as the correct interpretation of the 1969 FMSA. Indeed, the same Congress that enacted Section 210 (a) amended the 1969 FMSA to clarify expressly its approval of *Phillips* as properly interpreting existing law. S. Rep. 181, 95th Cong., 1st Sess. 36 (1977) (explaining that amending the 1969 FMSA to include expressly internal complaints is "intend[ed] to insure the continuing vitality of the various judicial interpretations of the [1969 Act] * * *, *e.g.*, *Phillips v. IBMA*, 500 F.2d 772; *Munsey v. Morton*, 507 F.2d 1202"); see also Pet. App. A13-A14. Congress's patterning of Section 210(a) of the ERA on the 1969 FMSA, and its express approval of *Phillips* as the correct interpretation of that Act, makes clear that Section 210(a) is to be interpreted in accordance with *Phillips*. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-701 (1979); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979).

In describing the sources for Section 210(a) of the ERA, Congress also indicated its reliance on the employee protection provisions of the National Labor

Relations Act (see pages 7-8, *supra*), which this Court had construed liberally prior to enactment of Section 210(a). In *NLRB* v. *Scrivener*, *supra*, the Court applied the term "testimony" in Section 8(a)(4) of the NLRA, 29 U.S.C. 158(a)(4), to include a written, sworn statement given by an employee to a governmental investigator but never actually used as testimony at a formal hearing. This Court's reasons for broadly construing Section 8(a)(4) of the NLRA apply with equal force to Section 210(a) of the ERA. Protecting quality assurance reports is necessary to prevent the NRC's " 'channels of information from being dried up by employer intimidation' " (*Scrivener*, 405 U.S. at 122, quoting *John Hancock Mut. Life Ins. Co.* v. *NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951)); this is especially important since the NRC's program "is dependent 'upon the initiative of individual persons' " (*ibid.* (citations omitted)).[7] Further, the language of the statute "reveals, * * * particularly by the word 'otherwise,' an intent on the part of Congress to afford broad rather than narrow protection to the employee" (*ibid.*);[8] broad protection

[7] This problem is further compounded for the NRC because, were all employees to complain directly to the NRC about perceived deficiencies, the Commission would be required to divert its limited resources away from other nuclear safety matters to the investigation and resolution of these complaints. Similarly, were employees to save their complaints until the NRC's formal licensing proceedings, the Commission would have to investigate these complaints without reliable quality assurance records. Thus, if the flow of information through a quality assurance program dries up, substantial strain and disruption could result for the NRC in enforcing nuclear safety requirements and in issuing operating licenses to nuclear utilities.

[8] Both Section 210(a) of the ERA and Section 8(a)(4) of the NLRA forbid an employer to discharge "or otherwise dis-

also accords with consistent agency interpretations (see *id.* at 122-123) by both the NRC[9] and the Department of Labor. Moreover, as in *Scrivener*, the language of the statute should be construed broadly because of the "practicalities of appropriate agency

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criminate" against an employee because of protected activities. The NLRA affords protection to those who have "filed charges or given testimony under the Act"; ERA Section 210(a) more comprehensively protects employees who "assist[] or participate[] in any manner" in any "proceeding" under the nuclear regulatory statutes "or in any other action" to carry out the purposes of the statutes, as well as employees who are "about to" commence, testify in, assist, or participate in such proceedings. This additional language indicates an intent for Section 210(a) to reach an even more comprehensive range of activities than NLRA Section 8(a)(4).

[9] The NRC filed an amicus brief in the present case explicitly endorsing the Department of Labor's position and describing at length why that interpretation is necessary to the continued efficacy of its regulatory program. The NRC had already interpreted its regulation at 10 C.F.R. 50.7, which states that protected activities "include but are not limited to" certain enumerated actions (see Pet. App. A15), to authorize fines of employers who discharge employees for raising internal quality assurance concerns, independent of the Secretary's finding of a Section 210(a) violation. Indeed, the NRC fined petitioner $64,000 for its discharge of inspector Wells in this case (see C.A. App. A21-A22). Petitioner's interpretation of Section 210(a) is completely at odds with the NRC regulation at 10 C.F.R. 50, App. B, § I—requiring that "[t]he persons and organizations performing quality assurance functions shall have sufficient authority and organizational freedom to identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions" —as well as the quality assurance program generally (see pages 2-3, *supra*). Finally, as discussed by the court of appeals (Pet. App. A16), the Department of Labor shares complaints filed with it with the NRC.

action" (*id.* at 123): much as an employee who participates in an NLRB investigation "may not be called formally to testify or may be discharged before any hearing at which he could testify" (*ibid.*), a nuclear industry employee's internal reporting of quality assurance concerns under the ERA may or may not lead to formal NRC hearings (depending on whether the employer corrects reported deficiencies and whether the NRC settles or dismisses other reported deficiencies). As in *Scrivener*, "statutory protection should not turn on the vagaries of the selection process or on other events that have no relation to the need for protection" (*id.* at 124). Finally, the interpretation of the statute should be "a liberal one in order fully to effectuate the section's remedial purpose" (*ibid.*).[10]

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[10] Petitioner also asserts (Pet. 8) that Section 210(a) should be read narrowly because there are a number of "other powerful incentives" in the ERA—including criminal and civil penalties and denial, suspension, or revocation of an operating license by the NRC—to discourage employers from ignoring meritorious safety issues raised by employees. This Court rejected similar arguments in *Scrivener* (405 U.S. at 124 n.5) that two other NLRA provisions, including the criminal penalty provided by Section 12, 29 U.S.C. 162, justify a narrow reading of Section 8(a)(4). The ERA provisions to which petitioner refers provide no protection at all for employees who raise safety concerns to their employers; fines or license suspension by the NRC do not give back pay and reinstatement to an employee who has been fired for raising internal safety complaints. Without such remedies, employees hardly have an incentive to raise safety complaints to their employers, thus drying up the NRC's normal channels of information (cf. *Scrivener*, 405 U.S. at 122). And if employees are discouraged from bringing meritorious safety issues to their employer's attention because of the absence of any protection against retaliation for doing so, then corporate officers will have no

In sum, Congress's direct joining of Section 210(a) to the 1969 FMSA and the NLRA—given the existing judicial interpretations of the latter two acts, the similar language in all three statutes, and their common purpose of protecting employees from employer retaliation—establishes a congressional intent in enacting Section 210(a) to provide protection for internal safety complaints of quality assurance inspectors in the nuclear industry. The court of appeals' construction of Section 210(a) in accordance with this legislative history, and in deference to the interpretation of both the Department of Labor and the NRC, was correct.[11]

2. Petitioner asserts that the contrary result of *Brown & Root, Inc., supra,* requires review in this case. We do not dispute that there is at least a potential conflict between *Brown & Root* and the decisions

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meritorious safety issues to ignore, and no liability for "knowingly and consciously" failing to provide notice to the NRC of the safety deficiencies (see 42 U.S.C. 5846(b)).

To the extent that petitioner is correct and the ERA's other incentives will induce the same behavior in employers, its plea for immediate uniformity in the circuits is undermined.

[11] Petitioner asserts that "not a single member of Congress spoke to the issue" of protecting internal complaints (Pet. 9). This, of course, is belied by the foregoing discussion. Moreover, Senator Hart, the sponsor of the bill that became ERA Section 210(a), stated that "the protection afforded is intended to apply, even if no formal proceeding is actually instituted as a result of the employee's assistance or participation" (124 Cong. Rec. 29771 (1978)), and co-sponsor Senator McClure stated that protection was intended to prevent discrimination against an employee "for providing assistance to NRC in the discharge of its regulatory responsibilities" (124 Cong. Rec. 29769 (1978)). Both statements indicate that Congress intended a statutory scope greater than formal legal or administrative proceedings.

of other courts on this issue (see pages 6-7 note 4, *supra*)—although, as our co-respondent demonstrates in his brief in opposition (at 2-4, 10-12), *Brown & Root* involved very different facts from this case [12]—but disagree that the conflict is sufficiently fixed or that its present impact is sufficiently severe to require this Court's consideration at this time.

The Fifth Circuit panel that decided *Brown & Root* was not presented with the exposition of the highly relevant legislative history described at pages 7-14, *supra*, and consequently misinterpreted the legislative history (747 F.2d at 1033-1034). For example, the fact that the court was not advised of the central place of *Phillips* in Congress's perceptions of Section 210(a) may explain why it failed to perceive the importance of these internal reports as an "essential preliminary stage" to an NRC proceeding (see page 9, *supra*).[13] The court in *Brown & Root* also was

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[12] In particular, we note that co-respondent's job was created specifically to re-check petitioner's compliance in certain areas after it had been fined $40,000 by the NRC for safety violations; thus, his reports should certainly be considered part of a proceeding under the nuclear regulatory statutes, even if the employee's reports in *Brown & Root* were not. U.S. C.A. Br. 6, 28-29.

[13] The court mistakenly looked to the Federal Mine Safety Act as amended in 1977, which expressly protects miners' internal complaints, and viewed the absence of such specific language in the ERA as "convincing[]" evidence that Congress actually intended to deny protection to the filer of an internal report (747 F.2d at 1034). Not only does the legislative history of the ERA discussed above establish that Congress intended a broad reading of Section 210(a) but, in passing the 1977 amendments to the FMSA, Congress made clear that it was merely making explicit in the statute what it believed was already there (see Pet. App. A13-A14).

unaware that the NRC agrees with the Secretary of Labor's construction of Section 210(a) as protecting internal safety reports.[14] This influenced its decision when, for example, it declined to give deference to the Secretary's construction of Section 210(a), partly on the mistaken belief that "[t]he Department of Energy (in particular, the Nuclear Regulatory Commission) has special competence in this area, not the Department of Labor" (747 F.2d at 1033). Its unawareness of the NRC's position may also explain why the court failed to weigh properly the vital and integral role that quality assurance inspectors play in enforcing the NRC's regulations.[15]

The Fifth Circuit has therefore not had the opportunity—before a panel or en banc[16]—to review the arguments made to and accepted by the court of appeals in this case. We hope that, when presented with all the arguments, the Fifth Circuit will reconsider its resolution of the issue. If it fails to do so, or rejects the Secretary's position, review by this Court may then be warranted.

Meanwhile, the Department of Labor informs us that the number of Section 210(a) complaints arising out of the Fifth Circuit has not been large. For example, in fiscal year 1985, the Department received

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[14] See page 12 note 9, *supra*.

[15] Similarly, had the Fifth Circuit known that the NRC needed and endorsed the Department of Labor's interpretation of Section 210(a), and had it known of the relevant legislative history, it should also have been more reluctant to conclude that the Department's interpretation upset a delicate balance between employer and employee, and between the costs and benefits of regulation (747 F.2d at 1034-1036).

[16] The government did not seek rehearing en banc in *Brown & Root*.

only 9 new ERA complaints there, out of 79 filed nationwide. Although we do not have exact numbers, it also appears that most of the complaints the Department receives either do not involve internal quality assurance complaints or involve internal complaints that may be resolved without reaching the scope of protection issue.[17] Thus, at least until such time as the Fifth Circuit has an opportunity to reconsider the issue, the Department of Labor believes that correction of the *Brown & Root* decision by this Court is not required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1986

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[17] For example, in *Dunham* v. *Brock*, No. 85-4575, currently pending in the Fifth Circuit, an inspector claimed retaliation for raising safety concerns both to his employer and to the NRC. The Secretary found that the inspector had been legitimately dismissed for insubordination, and dismissed the complaint.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20233